the predatory pricing of interstate and intrastate services; and the pricing of intrastate services can also be addressed at the state level.[656] Further, as we indicated in the Notice, the danger of successful predation by BOCs in the interexchange market is small.[657] We also reject MCI's proposal because, as the BOCs argue and MCI concedes, Commission review of affiliates' retail prices would place an enormous administrative burden on the Commission.[658] Such a review would also discourage BOC section 272 affiliates from competing on the basis of service prices.[659] Because we find that adequate remedies exist to address anticompetitive pricing by BOC section 272 affiliates, we believe that regulation of these new interLATA providers' retail prices pursuant to section 272(e)(3) would not conform with the deregulatory, pro-competitive goals of the 1996 Act.

D. Section 272(e)(4)

1. Background

259. Section 272(e)(4) states that a BOC and a BOC affiliate that is subject to section 251(c) "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated."[660] In the Notice, we sought comment regarding the scope of the term "interLATA or intraLATA facilities or services" including, for example, whether it included "information services and all facilities used in the delivery of such services."[661]

2. Comments

260. Parties are divided on the significance of section 272(e)(4). Several BOCs argue that section 272(e)(4) should be construed as a grant of authority specifying the facilities and services that a BOC may provide to its section 272 affiliate.[662] NYNEX argues that there is no basis on which to limit the scope of "interLATA or intraLATA facilities or services" that a BOC

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[656] We emphasize that these pricing limitations should not be interpreted to preclude the section 272 affiliates from offering innovative service packages and pricing plans.

[657] Notice at ¶ 137.

[658] MCI at 44; NYNEX Reply at 25.

[659] See Bell Atlantic Reply at 12.

[660] 47 U.S.C. § 272(e)(4).

[661] Notice at ¶ 89.

[662] Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 21-22; U S West Reply at 17-18.

can make available to its affiliate.[663] AT&T, supported by Ameritech and MCI, argues that section 272(e)(4) applies only to services and facilities that the BOC is separately authorized to provide.[664] PacTel argues, in the alternative, that if section 272(e)(4) is not a grant of authority, the definition of "telecommunications services" indicates that a BOC may provide wholesale, "carrier to carrier" interLATA services directly, rather than through the section 272 affiliate.[665] Parties disagree over whether, and under what circumstances, a BOC could be allowed to utilize capacity on its local network or its Official Services network to offer interLATA service to the public through its affiliate.[666] Finally, parties dispute the extent to which section 272(e)(4) applies to ISPs.[667]

3. Discussion

261. We conclude that section 272(e)(4) does not alter the requirements of sections 271 and 272(a). Section 272(e)(4) is not a grant of authority for BOCs to provide "interLATA or intraLATA facilities or services" in contravention of the scheme governing BOC provision of in-region interLATA services in section 271 or the requirement that these services must be provided through a separate affiliate in section 272(a).[668] Section 272(e)(4) is intended to ensure the nondiscriminatory provision of services that the BOCs are authorized to offer directly, and not through an affiliate, such as those services exempted from section 271 prior to the sunset of the separate affiliate requirement.[669] Like the other subsections of section 272, section 272(e)(4)

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[663] NYNEX at 36.

[664] AT&T at 44; Ameritech Reply at 32; MCI Reply at n.67; MCI Nov. 1 Ex Parte at 1-2.

[665] Letter from Michael Yourshaw, Wiley, Rein & Fielding to William F. Caton, Acting Secretary, FCC, Attachment at 1-2 (filed Nov. 27, 1996) (PacTel Nov. 27 Ex Parte).

[666] See, e.g., AT&T at 44; ALTS at 1-5; Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 20-22; U S West Reply at 17-18. Under the MFJ, the BOCs were authorized to maintain interLATA networks that are used to manage the operation of local exchange services; these services are commonly known as "Official Services." See generally United States v. Western Elec. Co., 569 F. Supp. at 1097-1101 (D.D.C. 1983) (determining that the RBOCs, and not AT&T, should own the Official Services networks) (subsequent history omitted). These networks perform various support functions, such as connecting directory assistance operators in different LATAs with customers and monitoring and controlling trunks and switches. Id. at n.179.

[667] Two BOCs argue that the definition of interLATA service precludes including information services within the scope of "interLATA or intraLATA facilities or services." PacTel at 38; U S West at 42. ITAA and Sprint believe that section 272(e)(4) applies to ISPs. ITAA at 24-25; Sprint at 45.

[668] AT&T at 42-44. We note that the record supports the Commission's tentative conclusion that section 272(e)(1) is not a grant of authority. See supra paragraph 239.

[669] For example, section 272(e)(4) requires BOCs to provide on a nondiscriminatory basis "network control signalling," which is an incidental service exempted from the section 271 approval process under section 271(b)(3). 47 U.S.C. §§ 271(b)(3), (g)(6).

prescribes the manner in which a BOC must offer services and facilities it is authorized to provide.[670]

262. We find no basis in the 1996 Act for the BOCs' argument that section 272(e)(4) is a grant of authority for the BOCs to provide interLATA services and facilities.[671] By its terms, section 272(e)(4) contains no reference to the provisions of section 271 governing BOC entry into in-region interLATA services. Therefore, interpreting section 272(e)(4) as an immediate and independent grant of authority that allows BOCs to provide "interLATA or intraLATA facilities or services,"[672] even where such provision is prohibited by other sections of the statute, would contravene the requirement of section 271 that BOCs receive Commission approval prior to providing these services.[673]

263. We are also unpersuaded by PacTel's alternative argument that section 272(e)(4) is not a grant of authority, but that section 272 allows the BOCs to provide wholesale, "carrier to carrier" interLATA services directly, rather than through the section 272 affiliate.[674] PacTel states that section 271 requires BOCs to obtain authorization from the Commission before providing "interLATA services," but, in contrast, section 272(a)(2)(B) only requires BOCs to offer interLATA "telecommunications service" through a separate affiliate. PacTel also states that the definition of "interLATA service" is broad and makes no distinction between retail and wholesale offerings,[675] but that "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[676] PacTel therefore argues that only interLATA telecommunications services offered "directly to the public" must be offered through a separate affiliate.[677] PacTel contends that retail services are services offered "directly to the public" that must be offered through a section 272 affiliate, but that wholesale services may

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[670] We note that, by its terms, section 272(e)(4) applies only to services and facilities that a BOC provides to its section 272 affiliate.

[671] Bell Atlantic Reply at 14; NYNEX Reply at 25-26; PacTel Reply at 21-22; U S West Reply at 17-18; Bell Atlantic Sept. 27 Ex Parte at 2; PacTel October 18 Ex Parte.

[672] 47 U.S.C. § 272(e)(4) (emphasis added).

[673] 47 U.S.C. § 271(d).

[674] PacTel Nov. 27 Ex Parte at 1-2.

[675] "InterLATA services" are defined as "telecommunications" between a point located in LATA and a point outside that LATA. 47 U.S.C. § 153(21). "Telecommunications" is defined as the "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. at 153(43).

[676] Id. at § 153(46).

[677] PacTel Nov. 27 Ex Parte at 2.

be offered from the BOC because they are not "telecommunications services."[678] We reject PacTel's argument because it is inconsistent with language of section 251(c)(4) and because the legislative history indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers.

264. A comparison between the definitions relied upon by PacTel and the language of section 251(c)(4) leads us to conclude that wholesale services are not excluded from the definition of "telecommunications service." Unlike the definition of telecommunications service, section 251(c)(4). explicitly uses the terms "retail" and "wholesale." Section 251(c)(4) states that incumbent LECs must offer, "at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . ."[679] This language implicitly recognizes that some telecommunications services are wholesale services. If this were not the case, the qualifying phrase "that the carrier provides at retail" would be superfluous.

265. The legislative history and the definition of common carriage further support this conclusion. The Joint Explanatory Statement states that the definition of telecommunications service "recognize[s] the distinction between common carrier offerings that are provided to the public . . . and private services."[680] Therefore, the term "telecommunications service" was not intended to create a retail/wholesale distinction, but rather a distinction between common and private carriage. Common carrier services include services offered to other carriers. For example, exchange access service is offered on a common carrier basis, but is offered primarily to other carriers.[681] In addition, both the Commission's rules and the common law have held that offering a service to the public is an element of common carriage. The Commission's rules define a "communication common carrier" as "any person engaged in rendering communication for hire to the public,"[682] and the courts have held that the indiscriminate offering of a service to the public is an essential element of common carriage.[683] Neither the Commission nor the courts, however, has construed "the public" as limited to end-users of a service. In NARUC I, the Court of Appeals for the D.C. Circuit held that an entity may qualify as a common carrier even if "the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction

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[678] Id.

[679] 47 U.S.C. § 251(c)(4).

[680] Joint Explanatory Statement at 115.

[681] See 47 C.F.R. § 69; see generally MTS and WATS Market Structure, Phase I, CC Docket 78-72, Third Report and Order, 93 FCC 2d 241, ¶¶ 13, 23 (1982) (access charges are regulated services and include "carrier's carrier" services).

[682] 47 C.F.R. § 21.2.

[683] NARUC v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) (NARUC I) (citing Semon v. Royal Indemnity Co., 279 F.2d 737, 739 (5th Cir. 1960)).

of the total population."[684] In light of the statutory language of section 251(c)(4), legislative history, Commission precedent, and the common law, we decline to limit the definition of telecommunications services to retail services.

266. If a BOC wishes to utilize the capacity on its Official Services network to provide interLATA services to other carriers or to end-users, it must do so in accordance with the requirements of the 1996 Act and our rules. Specifically, the BOC must provide in-region, interLATA services through a section 272 affiliate as required by section 272(a). If a BOC, therefore, seeks to transfer ownership of its Official Services network to its section 272 affiliate, it must ensure that the transfer takes place in a nondiscriminatory manner, as explained supra in part V.C, and must comport with our affiliate transaction rules.[685]

267. Finally, although the term "interLATA services" includes both interLATA information services and interLATA telecommunications services,[686] we conclude that ISPs are not entitled to nondiscriminatory treatment under section 272(e)(4). The definitional sections of the Act make clear that the term "carriers" is synonymous with the term "common carriers," which does not include ISPs.[687] Therefore, the requirement that the BOCs provide interLATA or intraLATA facilities or services to "all carriers" on a nondiscriminatory basis does not extend to ISPs under section 272(e)(4).[688]

E. Sunset of Subsections 272(e)(2) and (4)

1. Background

268. The Notice sought comment regarding how to reconcile an apparent conflict between sections 272(e) and 272(f). We noted that subsections 272(e)(2) and (e)(4) establish standards that refer to BOC affiliates.[689] On the one hand, those sections could be interpreted as

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[684] NARUC I, 525 F.2d at 641. See also Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475, 1480-81 (D.C. Cir. 1994) (describing the test for common carriage).

[685] 47 C.F.R. § 32.27(b). See also infra part VIII.B for a discussion of the limitations on a BOC's transfer of local bottleneck facilities.

[686] See supra note 668. We discuss the definition of interLATA services supra at part III.A.1.

[687] See 47 U.S.C. § 153(10).

[688] But cf. ITAA at 24-25 (arguing that, as in section 272(e)(2), section 272(f) demonstrates that all subsections of 272(e) apply to ISPs).

[689] Section 272(e)(2) states that the BOC and its affiliate subject to section 251(c) "shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) . . . unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions." 47 U.S.C. § 272(e)(2) (emphasis added). Section 272(e)(4) states

subject to sunset because they depend on the existence of a separate affiliate. On the other hand, section 272(f) specifically exempts section 272(e) from the sunset requirements.[690] We sought comment regarding whether Congress intended to eliminate the requirements of sections 272(e)(2) and (e)(4) once the BOCs were no longer required to maintain separate affiliates under section 272(a).[691]

2. Comments

269. Several BOCs contend that sections 272(e)(2) and (e)(4) cease to have meaning once the separate affiliate requirements of section 272 expire.[692] In contrast, Teleport and ITAA argue that the language of section 272(f) makes clear that Congress intended to exempt section 272(e) in its entirety from the sunset requirements.[693] MCI and TRA argue that subsections (e)(2) and (e)(4) could be applied as long as a BOC utilized an affiliate to offer interLATA services.[694]

3. Discussion

270. We find that the plain language of the statute compels us to conclude that sections 272(e)(2) and 272(e)(4) can be applied to a BOC after sunset only if that BOC retains a separate affiliate. The nondiscrimination obligations imposed by subsections (e)(2) and (e)(4) are framed in reference to a BOC's treatment of its affiliates. In contrast, the nondiscrimination obligations imposed by subsections (e)(1) and (e)(3) are framed in reference to the BOC "itself" as well as the BOC affiliate. If a BOC does not maintain a separate affiliate, subsections (e)(2) and (e)(4) cannot be applied because there will be no frame of reference for the BOC's conduct. Section 272(f), however, exempts section 272(e) from sunset without qualification. In order to give meaning to section 272(f), we conclude that subsections (e)(2) and (e)(4) will apply to a BOC's

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the BOC or its affiliate subject to section 251(c) "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." Id. § 272(e)(4) (emphasis added).

[690] Section 272(f)(1) states: "The provisions of this section (other than subsection (e)) shall cease to apply with respect to manufacturing activities or the interLATA telecommunications services of a [BOC] 3 years after the date such [BOC] or any [BOC] affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1) (emphasis added). Section 272(f)(2) contains similar language regarding section 272(e) in relation to the four-year sunset period for information services. Id. § 272(f)(2).

[691] Notice at ¶ 80.

[692] Bell Atlantic, Exhibit 1 at 8; PacTel at 35-36; SBC at 10; USTA at 25-26.

[693] Teleport at 17-18; ITAA at 25.

[694] MCI at 41; TRA at 17.

conduct so long as that BOC maintains a separate affiliate.[695] Subsections (e)(1) and (e)(3) will continue to apply in all events.

271. A number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply. As we explain in detail above, section 251(c)(5), section 251(g), and the Commission's rules imposing network disclosure and equal access requirements oblige BOCs to provide exchange access on a nondiscriminatory basis.[696] In addition, intraLATA services and facilities must be provided on a nondiscriminatory basis under section 251(c)(3), and the provision of interLATA services and facilities will continue to be governed by the nondiscrimination provisions of sections 201 and 202 of the Act. In addition, once local competition develops, it will provide a check on the BOCs' discriminatory behavior because competitors of the BOC affiliates will be able to turn to other carriers for local exchange service and exchange access.

VII. JOINT MARKETING

A. Joint Marketing Under Section 271(e)

1. Background

272. Section 271(e)(1) limits the ability of certain interexchange carriers to market interLATA services jointly with BOC local services purchased for resale. Specifically, the statute states that:

> Until a Bell operating company is authorized pursuant to [section 271(d)] to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

In the Notice, we sought comment on whether we should interpret section 271(e) to prohibit, for example, promoting the availability of interLATA services and local exchange services in the same advertisement, making these services available from a single source, or providing bundling discounts for the purchase of both services.[697] We also observed that the clear language of the

[695] Accord MCI at 41; TRA at 17.

[696] See supra part VI.B.

[697] Notice at ¶ 91.

statute only restricts covered interexchange carriers (i.e., those carriers that fall within the scope of section 271(e) of the Act) from joint marketing interLATA services and BOC local services purchased for resale.[698] Thus, section 271(e) does not preclude these interexchange carriers from jointly marketing local exchange services provided over their own facilities, or through the purchase of unbundled network elements pursuant to section 251(c)(3).[699] Nor does section 271(e) prohibit those interexchange carriers from "marketing" BOC resold local exchange services. Rather, the prohibition is limited to "jointly marketing" BOC resold local services with interLATA services.

2. Comments

273. Most commenters agree that bundling local and interLATA services constitutes the type of joint marketing that is prohibited by section 271(e).[700] MCI argues, however, that the scope of "joint marketing" includes only those activities that involve the combining of two categories of services in a package for a bundled price or a package that constitutes a single product.[701] Thus, according to MCI, the other restrictions proposed in the Notice -- i.e., promoting the availability of interLATA services and local exchange services in the same advertisement and making such services available from a single source -- are not prohibited.[702] The BOCs and USTA oppose MCI's interpretation of section 271(e).[703] They argue that allowing a covered interexchange carrier to produce joint advertisements and to sell both local and interLATA service from a single source would render section 271(e) meaningless.[704]

274. AT&T further contends that "marketing" should only encompass efforts by a firm to persuade a potential customer to purchase or subscribe to its services, and not "customer care" that occurs after the customer has signed up.[705] Such an interpretation would enable an interexchange carrier subject to section 271(e) to deal jointly with existing customers who have

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[698] Id. Only three interexchange carriers are covered by section 271(e) -- AT&T, MCI, and Sprint. See Federal Communications Commission, CCB, Industry Analysis Division, Long Distance Market Shares: Fourth Quarter 1995, Tbl. 4 (March 1996).

[699] Id.

[700] See, e.g., MCI at 46-47; Ameritech at 48-49; PacTel at 40; TRA at 18-19; Bell Atlantic Reply at 10-11.

[701] MCI Reply at 27.

[702] Id. at 26-27.

[703] See, e.g., SBC Reply at 19 n.31; NYNEX at 13-14; USTA Reply at 15-16; PacTel Reply at 24 n.26; Ameritech Reply at 27; Bell Atlantic Reply at 10.

[704] Id.

[705] AT&T at 53-54.

purchased both services by providing a single bill, or establishing a single point-of-contact to respond to maintenance and other customer inquiries.[706] The BOCs and USTA, on the other hand, contend that AT&T's proposal deliberately ignores the reality of telecommunications marketing.[707] They argue that telecommunications providers must constantly engage in marketing activities, even to existing subscribers, in order to win business for new services and to maintain goodwill.[708]

275. Most commenters agree with our observation in the Notice that section 271(e) only restricts joint marketing of interLATA services and local exchange services that covered interexchange carriers purchase for resale pursuant to section 251(c)(4).[709] USTA argues, however, that interexchange carriers should also be prohibited from jointly marketing local exchange services provided through the purchase of unbundled network elements pursuant to section 251(c)(3), because the purchase of such elements from a BOC is the equivalent of purchasing a BOC's local exchange services for resale.[710] Ameritech agrees that the section 271(e) joint-marketing prohibition only applies to BOC services purchased for resale under section 251(c)(4), but argues that the Commission should clarify that interexchange carriers may jointly market local and interLATA services only to the extent that their joint marketing campaign does not reach any customers to whom they provide BOC resold local exchange services.[711]

3. Discussion

276. Scope of section 271(e). We agree with the consensus of the commenters that the language in section 271(e) is clear -- the joint marketing prohibition applies only to the marketing of interLATA services together with BOC local exchange services purchased for resale pursuant to section 251(c)(4).[712] We refer to the latter services in the balance of this discussion as "BOC resold local services." In the First Interconnection Order, we stated that the terms of section 271(e) do not prevent affected interexchange carriers from marketing interLATA services jointly with local exchange services provided through the use of unbundled network elements obtained

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[706] Id.

[707] SBC Reply at 18-19; see also USTA Reply at 15-16; PacTel Reply at 24 n.26; Ameritech Reply at 27; Bell Atlantic Reply at 10-11.

[708] SBC Reply at 18-19.

[709] See, e.g., AT&T at 53; Sprint at 47-48; MCI Reply at 29-30.

[710] USTA at 29.

[711] Ameritech at 49-50.

[712] See e.g., AT&T at 53; Sprint at 47-48; MCI at 45-46; Ameritech at 49-50.

pursuant to section 251(c)(3).[713] We affirm that conclusion and, accordingly, reject USTA's suggestion that we extend the section 271(e) restriction to apply to the joint marketing of such services.[714] We find that the express text of the statute limits the prohibition to BOC resold local services obtained pursuant to section 251(c)(4) and we decline to extend the restriction beyond the limits mandated by Congress. We further conclude, for the same reason, that the joint marketing restriction does not apply if the covered interexchange carrier provides local service over its own facilities, or by reselling local exchange services purchased from a local exchange carrier that is not a BOC.

277. Specific Joint Marketing Restrictions. We conclude that Congress adopted the joint marketing restriction in section 271(e) in order to limit the ability of covered interexchange carriers to provide "one-stop-shopping" of certain services until the BOC is authorized to provide interLATA service in the same territory.[715] We agree with the majority of commenters that bundling BOC resold local services and interLATA services (including interLATA telecommunications and interLATA information services[716]) into a package that can be sold in a single transaction constitutes the type of joint marketing that Congress intended to restrict by enacting section 271(e).[717] We define "bundling" to mean offering BOC resold local exchange services and interLATA services as a package under an integrated pricing schedule.[718] Thus, we find that section 271(e) restricts covered interexchange carriers from, among other things, providing a discount if a customer purchases both interLATA services and BOC resold local services, conditioning the purchase of one type of service on the purchase of the other, and offering both interLATA services and BOC resold local services as a single combined product.[719] This restriction applies until the BOC receives authorization under section 271 to offer interLATA service in an in-region state, or February 8, 1999, whichever comes first.

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[713] First Interconnection Order at ¶ 335.

[714] USTA at 29.

[715] See, e.g., S. Rep. No. 104-23 104th Cong., 1st Sess. 43 (1995) (stating that the Committee intends [section 271(e)] to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services).

[716] See supra part III.A.1 (defining "interLATA services" to include interLATA telecommunications and interLATA information services).

[717] As the Senate Commerce Committee observed, "the ability to bundle [a variety of telecommunications services] into a single package to create "one-stop-shopping" will be a significant competitive marketing tool." S. Rep. No. 104-23 at 22-23. See MCI at 46-47; Ameritech at 48-49; PacTel at 40; TRA at 18-19; Bell Atlantic Reply at 10-11.

[718] See generally Computer II Final Order, 77 FCC 2d at 442; 47 C.F.R. § 64.702(e).

[719] See, e.g., MCI at 46-47.

278. We also conclude that section 271(e) bars covered interexchange carriers from marketing interLATA services and BOC resold local services to consumers through a single transaction. We define a "single transaction" to include, at a minimum, the use of the same sales agent to market both products to the same customer during a single communication. Although requiring separate transactions for different types of services might preclude interexchange carriers from taking advantage of economies of scale,[720] we agree with those commenters who argue that such a restriction is an essential element of the joint marketing prohibition in section 271(e) during the period the limitation remains in effect.[721] We reject the suggestion of some BOCs that the section 271(e) restriction requires covered interexchange carriers to establish separate sales forces for marketing interLATA services and BOC resold local services.[722] We agree with the commenting parties that claim neither the statute nor the legislative history indicates that Congress intended to impose such a requirement.[723] Moreover, in our view, requiring a separate sales force is not necessary to accomplish the primary congressional objective of barring the affected interexchange carrier from offering "one-stop shopping" for interLATA and BOC resold local services. Thus, a single agent is permitted to market interLATA services in the context of one communication, and to market BOC resold local services to the same potential customer in the context of a separate communication.

279. The application of the section 271(e) joint marketing restriction to advertising implicates constitutional issues. We are aware of our obligation under Supreme Court precedent to construe the statute "where fairly possible so as to avoid substantial constitutional questions."[724] In the advertising context, the Supreme Court has held that the First Amendment protects "the dissemination of truthful and nonmisleading commercial messages about lawful products and services."[725] We must be careful, therefore, not to construe section 271(e) as imposing an advertising restriction that is overly broad. The fact that section 271(e) permits a covered interexchange carrier to offer and market separately both interLATA services and BOC resold services and also permits such carriers to offer and market jointly interLATA services and local

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[720] Id.

[721] See generally SBC Reply at 19 n.31; NYNEX at 13-14; USTA Reply at 15-16; Ameritech Reply at 27; Bell Atlantic Reply at 10.

[722] See, e.g., Letter from Michael Kellogg, Counsel for Bell Atlantic, to Christopher Wright, Deputy General Counsel, FCC at 4 (filed Dec. 9, 1996) (Bell Atlantic Dec. 9 Ex Parte); Letter from Robert Pettit, Counsel for Pacific Telesis Group, to Christopher Wright, Deputy General Counsel, FCC at 6 (filed Dec. 9, 1996) (PacTel Dec. 9 Ex Parte).

[723] See, e.g., Letter from Frank W. Krogh, MCI, to Christopher Wright, Deputy General Counsel, FCC at 1-2 (filed Dec. 13, 1996) (MCI Dec. 13 Ex Parte); Letter from E. E. Estey, Government Affairs Vice President, AT&T, to William F. Caton, Acting Secretary, FCC at 4 (filed Dec. 13, 1996) (AT&T Dec. 13 Ex Parte).

[724] United States v. X-Citement Video, 115 S:Ct. 464, 467, 469 (1994).

[725] See 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1504 (1996).

services provided through means other than BOC resold local services (e.g., through the use of unbundled network elements, over its own facilities, or by reselling local exchange services purchased from a local exchange carrier that is not a BOC) makes the task of crafting an effective advertising restriction particularly difficult. For example, we see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service.[726] In addition, we cannot adopt a blanket rule that prohibits interexchange carriers from publicizing in one advertisement that they offer interLATA services and publicizing in a separate advertisement that they offer BOC resold local services. As MCI points out, the statute permits interexchange carriers to offer both types of services through the same corporate entity and under the same brand name.[727] Thus, such advertisements would be truthful statements about lawful activities.

280. A closer question is whether we may ban a covered interexchange carrier from claiming in a single advertisement that it offers both interLATA services and local services in instances where the carrier intends to furnish the latter through BOC resold local services, which it is authorized to market only on a stand-alone basis. On the one hand, such an advertisement would contain truthful statements about services that the interexchange carrier is authorized to provide. On the other hand, such an advertisement may be inconsistent with the section 271(e) prohibition against jointly marketing the two types of services. As some BOCs appear to recognize, however, the principal concern with the promotion of both services in a single advertisement is that it may suggest "to consumers that the services are available jointly as a package when in fact they are not."[728] We agree with these commenters that the First Amendment does not confer the right to deceive the public. Indeed, the Supreme Court has emphasized that the First Amendment does not prevent the government from regulating commercial speech to avoid such deceptions.[729] Further, the Court has held that the government "may require commercial messages to appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive."[730] Consistent with this precedent, we conclude that a covered interexchange carrier may advertise the availability of interLATA services and BOC resold local services in a single advertisement, but such carrier may not mislead the public by stating or implying that it may offer bundled packages of interLATA service and BOC resold service, or that it can provide "one-stop shopping" of both services through a single transaction. As discussed above, both activities are prohibited under section 271(e).

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[726] See paragraph 276, supra.

[727] MCI at 46.

[728] Bell Atlantic Dec. 9 Ex Parte at 4.

[729] 44 Liquormart, 116 S.Ct. at 1505 n.7, 1506.

[730] Id. at 1506 (internal quotation marks omitted).

281. We further conclude that the joint marketing restriction in section 271(e) applies only to activities that take place prior to the customer's decision to subscribe. We agree with AT&T that, after a potential customer subscribes to both interLATA and BOC resold local services from a covered interexchange carrier, that carrier should be permitted to provide joint "customer care" (i.e., a single bill for both BOC resold local services and interLATA services, and a single point-of-contact for maintenance and repairs).[731] Such activities are post-marketing activities. To impose additional prohibitions on post-marketing activities would add additional burdens not required by the statute. Furthermore, a rule that would require a customer to send separate payments to the same corporate entity would be confusing and burdensome, and therefore would not serve the public interest. Customers should also be permitted to make a single phone call for complaints and repairs about both local and long distance services once they have ordered both services. Because we interpret section 271(e) to apply only to activities that take place prior to a customer's decision to subscribe, we conclude that, once a customer subscribes to both local exchange and interLATA services from a carrier that is subject to the restrictions of 271(e), that carrier may market new services to an existing subscriber.

282. We recognize that the principles we have adopted to implement the requirements of section 271(e) may not address all of the possible marketing strategies that a covered interexchange carrier might initiate to sell BOC resold local services and interLATA services to the public. We emphasize, however, that in enforcing this statutory section, we intend to examine the specific facts closely to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing by conveying the appearance of "one-stop shopping" BOC resold local services and interLATA services to potential customers.

B. Section 272(g)

1. Marketing Restrictions on BOC Section 272 Affiliates

a. Background

283. Section 272(g)(1) provides that a BOC affiliate may not market or sell telephone exchange services provided by the BOC "unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services." In the Notice, we requested comment on what regulations, if any, are necessary to implement this provision.[732]

[731] AT&T at 53-54.

[732] Notice at ¶ 90.

b. Comments

284. The BOCs, USTA, and Citizens for a Sound Economy argue that 272(g)(1) is clear on its face, and thus no implementing regulations are necessary.[733] According to PacTel, it will be apparent when a section 272 affiliate is marketing and selling its affiliated BOC's services because those activities will be conducted publicly.[734] Also, PacTel argues that the public disclosure requirements of section 272(b)(5) will ensure that others will know what BOC services the section 272 affiliate is marketing and selling and the applicable terms and conditions.[735]

285. AT&T, on the other hand, proposes that the Commission adopt a requirement that the BOC announce the availability and terms of any joint marketing arrangement with a BOC affiliate at least three months prior to implementing it, so that any such joint marketing opportunity is made available to affiliated and unaffiliated providers on a truly nondiscriminatory basis.[736] Sprint asserts that the term "same or similar service" in section 272(g)(1) means not only the interLATA services of the affiliate, but information services as well.[737] Thus, the joint marketing by a BOC affiliate of information service and telephone exchange service would not be permitted unless other information service providers may jointly market those services as well.[738] MCI also requests that we clarify that the joint marketing provisions of section 272(g)(1) apply to the international sphere, "because BOCs already have a variety of relationships with foreign carriers that would make it possible for a BOC interLATA affiliate to market BOC special features available only from the BOC's local exchange platform to foreign end users through a switch in the foreign country."[739]

c. Discussion

286. We agree with the BOCs that no regulations are necessary to implement section 272(g)(1).[740] We do not adopt the three-month advance notice period proposed by AT&T,

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[733] See, e.g., Ameritech at 46; PacTel at 39; BellSouth Reply at i; U S West Reply at 4; USTA Reply at i; Citizens for a Sound Economy Reply at 3-4.

[734] PacTel at 39.

[735] Id.

[736] AT&T at 55; see also Teleport Reply at 6.

[737] Sprint at 47.

[738] Id.

[739] MCI at 45.

[740] See, e.g., Ameritech at 46; PacTel at 39; BellSouth Reply at i; U S West Reply at 4; USTA Reply at i; Citizens for a Sound Economy Reply at 3-4.

because it is not required by the statute.[741] Nor do we believe that such a notice period is necessary in order for other carriers to receive nondiscriminatory treatment. As PacTel notes, any agreement between a BOC and its affiliate that enables the affiliate to market or sell BOC services must be conducted on an arm's length basis, reduced to writing, and made publicly available as required by section 272(b)(5).[742] Thus, under section 272(g)(1), other entities offering services that are the same or similar to services offered by the BOC affiliate would have the same opportunity to market or sell the BOC's telephone exchange service under the same conditions as the BOC affiliate.

287. We also agree with Sprint that the term "same or similar service" in section 272(g)(1) encompasses information services.[743] Thus, a section 272 affiliate may not market or sell information services and BOC telephone exchange services unless the BOC permits other information service providers to market and sell telephone exchange services. Finally, we decline to adopt MCI's requested clarification that 272(g)(1) applies to the international sphere.[744] MCI appears to be concerned about a BOC's discriminatory provision of exchange access to foreign carriers. We conclude, however, that section 272(g)(1) applies only to the provision of "telephone exchange" service, not to the provision of "exchange access."[745] Section 202 bars a BOC from unreasonable discrimination in the provision of exchange access services used to originate and terminate domestic interstate and international toll traffic.[746]

2. Marketing Restrictions on BOCs

a. Background

288. Section 272(g)(2) states that "[a BOC] may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d)." In the Notice, we sought comment on whether section 272(g)(2) imposes the same types of restrictions on the BOCs that section 271(e) imposes on the interexchange carriers.[747]

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741 AT&T at 55; see also Teleport Reply at 4.

742 PacTel at 41.

743 Sprint at 47.

744 MCI at 45.

745 47 U.S.C. §§ 272(g)(1).

746 Id. at § 202.

747 Notice at ¶ 91.

b. Comments

289. With respect to section 272(g)(2), the BOCs argue that no implementing regulations are necessary.[748] They state that, once they have received interLATA authority under section 271, the BOC and its section 272 affiliate should be able to engage in all marketing and sales activities that other service providers are permitted to engage in, including advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, and providing discounts for the bundled purchase of both services.[749] In addition, they request that the Commission clarify that section 272(g) applies only to the relationship between a BOC and its section 272 affiliate.[750] Thus, the BOCs assert that they are not prohibited from aligning -- also known as "teaming"-- with a non-affiliate that provides interLATA services and marketing their respective services to the same customers prior to receiving interLATA authority under section 271.[751]

290. Other commenters argue that some marketing restrictions should be placed on the BOCs after section 271 authorization because of their status as incumbent local exchange carriers.[752] For example, MCI contends that BOCs should not be permitted to condition the availability of one category of service on the other, and that a discount should not be so great that it compels the customer to purchase both services.[753] Various other commenters argue that, when a customer calls a BOC to place an order for local service or to request a primary interexchange carrier, the BOC should be prohibited from turning such "inbound" communications into marketing opportunities for its long-distance affiliate.[754]

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[748] See, e.g., BellSouth at 7; Bell Atlantic Reply at 5-6.

[749] See, e.g., PacTel at 40; BellSouth at 7.

[750] See, e.g., NYNEX Reply at 15-16; U S West Reply at 18.

[751] See, e.g., NYNEX Reply at 15-16.

[752] See, e.g., CompTel at 24-25; Time Warner Reply at 18-19; AT&T Reply at 30-31; MCI Reply at 3-4; NCTA Reply at 3.

[753] MCI Reply at 30; see also LDDS at 16-17; USTA Reply, Haussman Statement at 10 (opposing MCI's suggestion).

[754] AT&T at 58; CompTel at 24; MCI Reply at 49; Sprint Reply at 28; see also NCTA at 4-6 (stating that the Commission should prohibit the BOC from conducting inbound telemarketing or referrals of its video services unless it provides the same marketing services to all cable operators and other providers of video programming in the same area).

c. Discussion

291. We agree with the BOCs that no regulations are necessary to implement section 272(g)(2).[755] The statute clearly states that BOCs are prohibited from either selling or marketing in-region interLATA services provided by a section 272 affiliate until they have received approval from the Commission under section 271.[756] We note, however, that section 272 does not prohibit a BOC that provides out-of-region interLATA services, or intraLATA toll service, from marketing or selling those services in combination with local exchange services. If such advertisements reach in-region customers, however, the BOC must make it clear to those customers that the advertisements do not apply to in-region interLATA services.[757] This obligation is similar to the obligation discussed above, which requires covered interexchange carriers to disclose to consumers receiving BOC resold local service that bundled packages are not available to them.[758] After a BOC receives authorization under section 271, the restriction in section 272(g)(2) is no longer applicable, and the BOC will be permitted to engage in the same type of marketing activities as other service providers.

292. Inbound Marketing. We conclude that BOCs must continue to inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects. The obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act, because we have not adopted any regulations to supersede these existing requirements.[759] Specifically, the BOCs must provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area.[760] A customer orders "new service" when the customer either receives service from the BOC for the first time, or moves to another location within the BOC's in-region territory.[761] As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.[762] We decline to adopt NCTA's request that we extend this obligation

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[755] See, e.g., BellSouth at 8-9; Ameritech Reply at 22-25; U S West Reply at 4.

[756] 47 U.S.C. § 272(g)(2).

[757] See e.g., LDDS at 15-16 (stating that section 272(g) ensures that the operating company would not be able to create a self-fulfilling prophecy through premature advertising and marketing activities).

[758] See supra part VII.A.

[759] See, e.g., PacTel Reply at 24-25; NYNEX Oct. 23 Ex Parte at 2-3.

[760] See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 935, 950 (1985); see also 47 U.S.C. § 251(g).

[761] United States v. Western Elec. Co., 578 F.Supp 668, 676-77 (D.D.C. 1983).

[762] See Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d at 950.

to require that BOCs inform inbound callers of other cable operators and providers of video services in the area,[763] however, because no such obligation currently exists, and no new requirement is imposed by the statute. We further conclude that the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g).[764] Thus, a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice.[765]

293. Teaming. We conclude that section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving section 271 approval. We agree with the BOCs that the language of section 272(g) only restricts the BOC's ability to market or sell interLATA services "provided by an affiliate required by [section 272]."[766] We note, however, that any equal access requirements pertaining to "teaming" activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization. Thus, to the extent that BOCs align with non-affiliates, they must continue to do so on a nondiscriminatory basis.

3. Section 272(g)(3)

a. Background

294. Section 272(g)(3) states that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection [272](c)."[767]

b. Comments

295. During the course of this proceeding, various commenters suggested types of marketing activities that fall within the scope of section 272(g)(3)[768] and, therefore, would not be subject to the nondiscrimination requirements in section 272(c). For example, NYNEX states that marketing activities encompassed by section 272(g) should include: sales activities (the use of sales channels to make customer referrals, to act as a sales agent, and to resell services);

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[763] NCTA at 4-6.

[764] NYNEX Oct. 23 Ex Parte at 3.

[765] Id.

[766] 47 U.S.C. § 272(g)(2).

[767] 47 U.S.C. § 272(g)(3).

[768] See, e.g., NYNEX at 13-14; Letter from Robert Blau, Vice President, Executive and Federal Regulatory Affairs, BellSouth, to William Caton, Acting Secretary, FCC at attachment 3 (BellSouth Nov. 14 Ex Parte).

advertising and promotion activities; and other marketing activities (such as product development, product management, market management, channel management, market research, and product pricing).[769] NYNEX also suggests that the following activities do not fall within the definition of marketing: strategic planning and resource allocation, as well as the corporate responsibility for coordination and oversight of all corporate functions and activities, including marketing.[770]

c. Discussion

296. Some of the activities identified by the parties appear to fall clearly within the scope of section 272(g)(3) and hence would be excluded from the section 272(c) nondiscrimination requirements. For example, activities such as customer inquiries, sales functions, and ordering, appear to involve only the marketing and sale of a section 272 affiliate's services, as permitted by section 272(g). Other activities identified by the parties, however, appear to be beyond the scope of section 272(g), because they may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings. In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.

C. Interplay Between Sections 271(e), 272(g) and Other Provisions of the Statute

1. Background

297. In the Notice, we sought comment on whether the affiliate may purchase marketing services from the BOC on an arm's length basis pursuant to section 272(b)(5), or whether a BOC and its affiliate should be required to contract jointly with an outside marketing entity for joint marketing of interLATA and local exchange service in order to comply with section 272(b)(3).[771] We also sought comment on the interplay between the marketing restrictions in sections 271 and 272 and the CPNI provisions set forth in section 222 that are the subject of a separate proceeding.[772] In addition, we requested comment on whether the joint marketing provision in section 274(c) has any bearing on how we should apply the joint marketing provisions in sections 271 and 272.[773]

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[769] NYNEX at 13-14.

[770] Id. at n.13.

[771] Notice at ¶ 92.

[772] Id. at ¶ 93.

[773] Id.

2. Comments

298. The BOCs oppose any proposal that would require them to obtain joint marketing services from an unaffiliated entity.[774] They argue that such a requirement would directly contravene rights granted to them under section 272(g) and, therefore, would violate the Act.[775] They contend that section 272(b)(5) merely requires that all transactions between a BOC and its section 272 affiliate, including the provision of marketing services, be on an "arms-length basis," in writing, and made available for public inspection.[776] Sprint asserts that, while the statute does not require that an outside entity be used, such a requirement would make it easier for the Commission and the public to ensure that neither competition nor monopoly local ratepayers are harmed by such joint activities.[777]

299. With respect to CPNI, NYNEX argues that a BOC should be allowed to use a customer's local exchange CPNI to sell its affiliate's interLATA services to the same customer, or to transfer a customer's local exchange CPNI to its affiliate under a referral arrangement, provided the customer orally consents to such use of information during the call.[778] AT&T and Time Warner assert that CPNI may be made available to a BOC affiliate only on nondiscriminatory terms, in accordance with section 272(c)(1).[779] PacTel and Time Warner assert that the joint marketing provisions in section 272(g) do not modify the statutory provisions concerning CPNI.[780] Consequently, they argue that BOCs that engage in joint marketing activities are required to comply with rules that the Commission adopts in CC Docket No. 96-115 to implement section 222 of the 1996 Act.[781] With respect to the interplay between sections 272(g) and 274(c), PacTel and the Yellow Pages Publishers Association argue that section 272(g) has no bearing on section 274(c) because Congress intended to create separate requirements for electronic publishing.[782]

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[774] See, e.g., Ameritech at 50; Bell Atlantic at 9; NYNEX at 14-17; PacTel at 41.

[775] Id.

[776] See, e.g., Bell Atlantic at 9.

[777] Sprint at 49.

[778] NYNEX at 19.

[779] AT&T at 59-60; Time Warner at 26.

[780] PacTel at 41; Time Warner at 26.

[781] Id.

[782] PacTel at 41; YPPA at 10.

3. Discussion

300. As discussed above in Part IV.C, we conclude that a BOC and its affiliate are not required to contract jointly with an outside entity in order to comply with section 272(b)(3). Thus, a BOC and its affiliate may provide marketing services for each other, provided that such services are conducted pursuant to an arm's-length transaction, consistent with the requirements of section 272(b)(5).[783] We decline to address parties' arguments raised in this proceeding regarding the interplay between section 272(g) and either section 222 or section 274(c) to avoid prejudging issues in our pending CPNI proceeding, CC Docket No. 96-115, or our electronic publishing proceeding, CC Docket No. 96-152. We emphasize that, if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.

VIII. PROVISION OF LOCAL EXCHANGE AND EXCHANGE ACCESS BY BOC AFFILIATES

A. Background

301. In the Notice, we expressed concern that a BOC might attempt to circumvent the section 272 safeguards by transferring local exchange and exchange access facilities and capabilities to one of its affiliates.[784] We requested comment on whether we should prohibit all transfers of network capabilities from a BOC to an affiliate.[785] Alternatively, we sought comment on whether a BOC transfer of network capabilities to an affiliate would make that affiliate a successor or assign of the BOC pursuant to section 3(4)(B) of the Act and, consequently, subject the affiliate to the nondiscrimination requirements of section 272(c)(1) and 272(e).[786]

302. We also requested comment on whether, if a BOC were permitted to transfer local exchange and exchange access capabilities to an affiliate, we should exercise our general rulemaking authority to adopt regulations to prevent such an affiliate from engaging in discriminatory practices, or whether existing statutory prohibitions on discrimination are sufficient.[787] For example, we noted that BOC affiliates that provide interstate interLATA telecommunications services already would be subject to the requirements of sections 201 and

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[783] For further discussion of section 272(b)(5), see supra part IV.F.

[784] Notice at ¶ 70. We note that such a transfer could occur between a BOC and any of its affiliates, not just a section 272 affiliate.

[785] Id.

[786] Id.

[787] Id. at ¶ 71.

202, which are applicable to all common carriers.[788] Those obligations would not apply to information services affiliates and manufacturing affiliates, however, because they are not "common carriers" under the Act.[789] As an additional matter, we tentatively concluded that a BOC affiliate that is classified as an incumbent LEC would also be subject to the nondiscrimination requirements of section 272(c).[790]

B. Comments

303. Interexchange carriers and other potential local exchange competitors argue that either a BOC should be prohibited from transferring any of its local exchange and exchange access facilities or capabilities to an affiliate, or, if any transfer occurs, the affiliate should be considered a successor or assign that is subject to the requirements of section 272.[791] BOCs, on the other hand, argue that an absolute prohibition on the transfer of network capabilities is overly broad.[792] They further assert that a BOC affiliate should not be considered a successor or assign of the BOC merely because a transfer of network capabilities has occurred between a BOC and an affiliate. Rather, such affiliate should only become a successor or assign if it "substantially take[s] the place of the BOC in the operation of one of the BOC's core businesses."[793] Because, in their view, only substantial transfers should affect a BOC affiliate's status as a successor or assign, the BOCs contend that the real issue is what constitutes a "substantial transfer of network capabilities."[794]

304. In addition, the BOCs assert that, based on the plain language of the statute, the section 272(c) safeguards only apply to the BOC or an affiliate that is a "successor or assign" of the BOC.[795] They argue that, unlike sections 272(a) and (e), section 272(c) does not apply to BOC affiliates merely because they qualify as incumbent LECs that are subject to the

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[788] Id.

[789] Id.

[790] Id. at ¶ 79.

[791] See, e.g., Letter from Jeffrey Sinsheimer and Lesla Lehtonen, California Cable Television Association, to William F. Caton, Acting Secretary, FCC, at 2 (filed Oct. 15, 1996) (CCTA Oct. 15 Ex Parte) (stating that, at a bare minimum, the FCC must act to ensure that the BOCs are not permitted to transfer hard assets -- such as switches or subscribers -- or intangible assets -- such as intellectual property -- to unregulated affiliates).

[792] See, e.g., Ameritech at 59-60.

[793] Ameritech at 60; see also BellSouth at 33-34; PacTel at 24-25.

[794] See, e.g., PacTel at 25-26.

[795] See, e.g., Ameritech at 60-61.

requirements of section 251(c).[796] Ameritech also requests that we clarify that a BOC affiliate will not be regulated as an incumbent LEC solely because it offers local exchange and exchange access services.[797] According to Ameritech, section 251(c) only applies to entities that meet the definition of incumbent LEC under section 251(h).[798] Thus, if an affiliate provides local exchange service through its own facilities or by reselling the BOC's local exchange service, it would not necessarily be classified as an incumbent LEC.[799]

305. Through comments and ex parte presentations, several potential local competitors argue that BOCs also might be able to circumvent the separation requirements of section 272 by creating an integrated affiliate that offers a combination of local, intraLATA, and interLATA services.[800] These parties assert that several BOCs have already submitted applications to state regulatory commissions seeking authority to provide both local exchange services and interLATA services through the same affiliate.[801] According to Teleport, if such integrated affiliates are permitted, the development of effective competition in the local exchange market will be jeopardized.[802] One of Teleport's concerns is that the BOC or its parent may choose to upgrade the section 272 affiliate's network rather than the incumbent LEC network in order to avoid the obligation imposed by section 251(c) of the Act to offer such facilities, and the new services they are capable of providing, to their competitors.[803] Thus, potential local competitors urge us either to clarify that the Act prohibits a BOC from creating such an integrated affiliate or, in the alternative, to use our discretionary authority to prevent such activities.[804]

306. The BOCs, on the other hand, argue that section 272(g) and section 251 specifically allow them to create a section 272 affiliate that offers both local exchange and interLATA services, and that section 272(a) of the 1996 Act does not prohibit a section 272

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[796] Id.

[797] Notice at ¶ 79; Ameritech at 58 n.68.

[798] Id.

[799] Id.

[800] See, e.g., Teleport Oct. 8 Ex Parte at 2; CCTA Oct. 15 Ex Parte at 1-2.

[801] Id. The Ohio and Michigan commissions confirm in their comments that they have already received requests from BOC 272 affiliates for authorization to offer local exchange services in conjunction with interLATA services. Michigan Commission at 4-6; Ohio Commission at 6-8.

[802] Teleport Oct. 8 Ex Parte at 5.

[803] Teleport at 5; see also AT&T at 21-22.

[804] E.g., Teleport at 7-13; NCTA at 10; Time Warner Reply at 19; CCTA Oct. 15 Ex Parte at 1-2 (stating that, although the 1996 Act does not address the provision of local service -- either on a resale or facilities basis -- by a BOC section 272 affiliate, the Commission should adopt a prohibition against such activities as a policy matter).

affiliate from providing local exchange service -- either by reselling BOC local service or through the purchase of unbundled elements.[805] They also assert that, as a policy matter, allowing the section 272 affiliate to provide service through unbundled elements on the same terms and conditions as other local providers will promote competition and encourage the section 272 affiliate to provide innovative new services.[806]

307. In response to the BOCs, CCTA argues that there is no statutory basis for allowing a section 272 affiliate to provide local exchange services. According to CCTA, section 272(g)(1) does not permit section 272 affiliates to provide both local and interLATA services; rather, it only grants them the authority to market such services jointly.[807] CCTA further argues that section 272 affiliates should be prohibited from offering local exchange service, because "the Senate stated unequivocally that the long distance operations of the BOCs must be structurally separate from 'any entities' providing local exchange services."[808] In addition, CCTA asserts that section 251 cannot be relied upon as a basis for allowing section 272 affiliates to provide local exchange services, because the Act does not treat RBOCs or their affiliates as new entrants or telecommunications carriers that are entitled to request nondiscriminatory access to unbundled elements pursuant to section 251.[809]

308. AT&T and MCI, on the other hand, argue that section 272(g)(1) allows section 272 affiliates to resell the BOC's local services, but does not permit section 272 affiliates to purchase unbundled network elements from the BOC.[810] According to AT&T, section 272 affiliates will be able to avoid paying access charges if they are permitted to provide local exchange services using unbundled elements, which will also enable such affiliates to avoid the imputation requirements of section 272(e)(3).[811] AT&T further argues that, to the extent that a section 272 affiliate is able to avoid the imputation requirements of section 272(e), the BOC would have perverse incentives to maintain access charges at rates above those for unbundled network elements.[812] MCI asserts that opportunities for discrimination and cross-subsidy are substantially

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[805] E.g., Ameritech Reply at 17-19; NYNEX Reply at 9 n.23; PacTel Reply at 22; U S West at 57.

[806] See, e.g., Ameritech Sept. 19 Ex Parte at 3.

[807] Letter from Alan J. Gardner, Vice President Regulatory & Legal Affairs, CCTA to John Nakahata, Senior Legal Advisor to Chairman Reed Hundt, FCC at 3 (filed Dec. 2, 1996) (CCTA Dec. 2 Ex Parte).

[808] Id. at 4.

[809] Memorandum from Alan Gardner, Glenn Semow, and Peter Casciato, CCTA to Linda Kinney, Policy and Program Planning Division, Common Carrier Bureau, FCC at 1-2 (filed Dec. 12, 1996) (CCTA Dec. 12 Ex Parte).

[810] See MCI Nov. 1 Ex Parte at 2-3; AT&T Oct. 15 Ex Parte at 2; see also Time Warner Reply at 19.

[811] AT&T Oct. 15 Ex Parte at 2.

[812] Id.

greater when a BOC provides network elements to its affiliate than when it offers retail services at a standard wholesale discount.[813]

C. Discussion

309. Transfer of local exchange and exchange access capabilities. We conclude that a BOC cannot circumvent the section 272 requirements by transferring local exchange and exchange access facilities and capabilities to an affiliate. As we discussed above, all goods, services, facilities, and information that the BOC provides to its section 272 affiliate are subject to the section 272(c)(1) nondiscrimination requirement.[814] Application of section 272(c)(1) to the BOC's provision of such items should address to a large extent concerns about the BOC "migrating" or "transferring" key local exchange and exchange access services and facilities to the 272 affiliate. We note, however, that there are still legitimate concerns that a BOC could potentially evade the section 272 or 251 requirements by, for example, first transferring facilities to another affiliate or the BOC's parent company, which would then transfer the facilities to the section 272 affiliate. To address this problem, we conclude that, if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an "assign" of the BOC under section 3(4) of the Act with respect to those network elements. Any successor or assign of the BOC is subject to the section 272 requirements in the same manner as the BOC.[815] We also note that, based on the plain language of the statute, section 272(c) only applies to the BOC or an affiliate that is a "successor or assign" of the BOC. We agree with Ameritech that, unlike sections 272(a) and (e), section 272(c) does not apply to BOC affiliates merely because they qualify as incumbent LECs.[816]

310. We decline to adopt an absolute prohibition on a BOC's ability to transfer local exchange and exchange access facilities and capabilities to an affiliate, because we conclude based on the record before us that such a restriction would be overly broad and exceed the requirements of the Act.[817] We note, however, that our determination does not preclude a state from prohibiting a BOC's transfer of local exchange facilities under its regulatory framework for incumbent LECs.

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[813] MCI Nov. 1 Ex Parte at 3.

[814] See supra part V.C.

[815] See 47 U.S.C. § 153(4)(B) (defining a "BOC" to include any successor or assign of any BOC that provides wireline telephone exchange service). Thus, the interLATA and manufacturing operations contemplated by section 272 would need to occur in an affiliate other than the one to which the local exchange and exchange access facilities have been transferred.

[816] See Ameritech at 60-61.

[817] See, e.g., Ameritech at 57; see also USTA at 24.